Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs

2000

Salt Lake County v. Western Dairymen : Reply Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2

 Part of the Law Commons

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.
Mark J. Williams; Plant, Wallace, Christensen & Kanell; attorney for appellees.
Craig W. Anderson, Jay Stone; attorneys for appellant.

Recommended Citation
Reply Brief, *Salt Lake County v. Western Dairymen*, No. 20000503.00 (Utah Supreme Court, 2000).
https://digitalcommons.law.byu.edu/byu_sc2/504

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE SUPREME COURT OF THE STATE OF UTAH

SALT LAKE COUNTY, a body corporate and politic of the State of Utah, Plaintiff/Appellant, vs. WESTERN DAIRYMEN COOPERATIVE, INC.; CONSOLIDATED REALTY GROUP; WILLIAM K. MARTIN, JR.; HERMAN L. FRANKS; and CHARLES L. DAVIS, Defendants/Appellees.	)	**REPLY BRIEF OF APPELLANT** Case No. 20000503-SC

Appeal from the Third District Court, Salt Lake Department, State of Utah
Honorable Judge Sheila McCleve presiding
Salt Lake City, State of Utah

CRAIG W. ANDERSON (#0078)
Deputy Salt Lake County District Attorney
JAY STONE (#3125)
Deputy Salt Lake County District Attorney
Attorneys for Appellant Salt Lake County
2001 South State #S3600
Salt Lake City, Utah 84190
Telephone: (801) 468-2655

Mark J. Williams
PLANT, WALLACE, CHRISTENSEN & KANELL, P.C.
Attorney for Appellees
136 East South Temple, Suite 1700
Salt Lake City, Utah 84111

FILED
MAR 27 2001
CLERK SUPREME COURT
UTAH

DISTRICT ATTORNEY
SALT LAKE COUNTY

DAVID E. YOCOM
DISTRICT ATTORNEY

SALT LAKE COUNTY

CIVIL **DIVISION**

Karl Hendrickson
Division Administrator

Mary Ellen Sloan
Assistant Division Administrator

FILED
UTAH SUPREME COURT
SEP 17 2001
PAT BARTHOLOMEW
CLERK OF THE COURT

September 11, 2001

Pat Bartholomew
Clerk of the Supreme Court
450 South State
Salt Lake City, Utah 84114-0210

Re: *Salt Lake County v. Western Dairymen Cooperative, Inc., et al.*
Case No. ~~20000~~593-SC 20000503-SC

Dear Ms. Bartholomew:

Pursuant to Rule 24(i) of the Utah Rules of Appellate Procedure, this letter will serve as notice that Salt Lake County, the Appellant in the above captioned matter, recently became aware of the decision of the Supreme Court of Utah in the matter of *Mitchell v. Christensen*, 2001 UT 80; 2001 Utah LEXIS 148, filed August 31, 2001. The Court's decision regarding the duty of sellers to disclose conditions which cannot be discovered through reasonable care is relevant to Point II F on page 33 of the County's Brief on Appeal.

Sincerely,

CRAIG W. ANDERSON
Deputy District Attorney

CWA/cgc/C17.doc
cc: Mark Williams
Matt Evans

IN THE SUPREME COURT OF THE STATE OF UTAH

SALT LAKE COUNTY, a body corporate and politic of the State of Utah, Plaintiff/Appellant, vs. WESTERN DAIRYMEN COOPERATIVE, INC.; CONSOLIDATED REALTY GROUP; WILLIAM K. MARTIN, JR.; HERMAN L. FRANKS; and CHARLES L. DAVIS, Defendants/Appellees.	)	**REPLY BRIEF OF APPELLANT** Case No. 20000503-SC

Appeal from the Third District Court, Salt Lake Department, State of Utah
Honorable Judge Sheila McCleve presiding
Salt Lake City, State of Utah

CRAIG W. ANDERSON (#0078)
Deputy Salt Lake County District Attorney
JAY STONE (#3125)
Deputy Salt Lake County District Attorney
Attorneys for Appellant Salt Lake County
2001 South State #S3600
Salt Lake City, Utah 84190
Telephone: (801) 468-2655

Mark J. Williams
PLANT, WALLACE, CHRISTENSEN & KANELL, P.C.
Attorney for Appellees
136 East South Temple, Suite 1700
Salt Lake City, Utah 84111

LIST OF PARTIES IN LOWER COURT

PLAINTIFFS:	Salt Lake County, a body corporate and politic of the State of Utah
DEFENDANTS:	Western Dairymen Cooperative, Inc., Consolidated Realty Group, William K. Martin, Jr., Herman L. Franks, and Charles L. Davis

TABLE OF CONTENTS

TABLE OF CONTENTS, CONTINUED

TABLE OF AUTHORITIES

CASES: Page

RULES:

TABLE OF AUTHORITIES, CONTINUED

STATUTES:

OTHER:

ARGUMENT

POINT I

THE TRIAL COURT'S FINDING THAT THERE WAS NO CONTRACT IS IN ERROR BECAUSE ALL NECESSARY ELEMENTS ARE PRESENT

The trial court found that the "Agency Disclosure" was not a contract. (Order, Record at 00646). The Court reasoned that the fiduciary duties alleged in the Complaint were common law duties because "the duties of the real estate agents and brokers existed independent of any contract or agreement." (Order, record at 00646). The Order clarified, however, that the County's complaint *pled* an action for breach of duties arising out of a contract.

The necessary elements of a contract are: (1) parties capable of contracting; (2) mutual consent; (3) a lawful object; and (4) consideration. *See*, *Geraets v. Halter*, 588 N.W.2d 231, 233 (S.D. 1999);[1] and *Roberts v. Gaskins*, 486 S.E.2d 771 (S.C. Ct. App. 1997).[2] These elements are generally recognized in Utah case law. *See*, *Brimley v. Gasser*, 754 P.2d 97, 98 (Utah Ct. App. 1988) (quoting *Golden Key Realty v. Mantas*, 699 P.2d 730, 732 (Utah 1985)).[3]

---

[1] The elements necessary for a contract are "(1) parties capable of contracting; (2) their consent; (3) a lawful object; and (4) sufficient cause or consideration."

[2] "The necessary elements of a contract are an offer, acceptance and valuable consideration."

[3] "The elements essential to contracts generally must be present in a contract of accord and satisfaction, including offer and acceptance, competent parties, and

Consolidated alleges that the "Agency Disclosure" is not a contract because there are independent common law and statutory duties which are merely reflected in the writing. This, however, is not an appropriate basis upon which to deny the existence of a contract and deprive a party of the benefits of its bargain. In essence, Consolidated is arguing that the "Agency Disclosure" cannot be a contract because there was no consideration. This is not explicitly stated in Consolidated's Brief, but in finding that no contract exists, presumably one or more of the necessary elements of the contract must be missing.

Which element is missing in this case? The Agency Disclosure is in writing and is signed by the parties in counterparts. (Record at 00395 and 00396). Thus, the parties manifested their mutual assent to the contents of the document. There is no argument that the parties did not have the capacity to contract. This leaves "consideration" as the only potential missing element. This point was in fact relied on by counsel for Consolidated at the time of the hearing on its Motion to Dismiss. (Record at 00664, Transcript page 7, lines 13 and 14). At that time, Consolidated's counsel argued that the Agency Disclosure could not be a contract because it was not supported by consideration.

A. The Agency Disclosure is Supported by Consideration

An analysis of the writing contradicts a finding of a lack of consideration. Salt Lake County gave Consolidated the right to be a dual agent in this transaction.

---

consideration."

Consolidated could not act as a "dual agent" with its consequent benefits,[4] without entering into a written agency agreement with the County and WDCI. *See,* Administrative Rule 162-6-1.6.1.11.3 and Rule 162-6-2.6.2.16.3.

In return for the County's consent, Consolidated agreed to exercise not due care, not reasonable care, not adequate care, not sufficient care, but the "utmost" care in the transaction. Consolidated bound itself to a standard beyond any owed to the County outside the agency agreement. This higher standard is adequate consideration to support a contract.

The significance of this higher standard is demonstrated by *Denco Bus v. Keller*, 212 P.2d 469, 472-73 (Okla. 1949) (emphasis added) where that court observed:

> Instead of framing the instructions to impose the **utmost** or the highest degree of care, the court limited that term by the expression "ordinary care." That instruction **lowered the standard of care** fixed by law, because "ordinary care," in law, at least, means the same as "due care" or "reasonable care" while "**utmost care**" and "highest degree of care" is such a degree of care as would be exercised by a very careful, prudent and competent person under the same or similar circumstances.

The phrase "utmost care" is not ambiguous, in that it clearly imposes a higher standard of care than a common law "reasonable care" standard, and requires a finding that the contract was supported by adequate consideration. Consolidated even concedes that the Agency Disclosure "actually exceeds" in some respects the requirements

---

[4] This provision also avoided a splitting of the sales commission between Consolidated and another broker.

contained in the Utah Administrative Code. (Brief of Appellees, page 11).

B. A Higher Standard of Care is Imposed by the Disclosure Agreement

A comparison of the duties imposed by statute and the administrative rules[5] reveals that the fiduciary duties are *not* the same as those imposed by the Agency Disclosure. The fiduciary duties under the Agency Disclosure require more from the broker and agents.

1. Duties Under the Administrative Rule

Rule 162-6-1.6.1.11.3 requires that a broker and licensees acting on his behalf who represent *both* the buyer and seller have written agency agreements with the buyer and seller which define the scope of the limited agency and which demonstrate the broker has obtained the informed consent of both the buyer and seller to the limited agency.[6]

Rule 162-6-2.6.2.16.3.1(a) states that dual agents or limited agents[7] act in a "neutral capacity" and "shall advance the interests of each party [only] so long as it does not conflict with the interest of the other party. In the event of conflicting interests, the

---

[5] Rules R162-6-1.6.1.11.3 and R162-6-2.6.2.16.3, Utah Administrative Code, promulgated by the Utah Department of Commerce, Division of Real Estate.

[6] Rules 162-6-2.6.2.7 and 6.2.7.1, Utah Administrative Code, require a written disclosure *prior* to entering into a binding agreement and again at the time of entering into a binding agreement for a sale.

[7] It is conceded by all parties that Martin and his agents represented both the buyer and the seller and were limited agents, sometimes referred to as dual agents.

agent will be held to the standard of neutrality." The rule provides that the "limited agent *may not* disclose any information given to the agent by either principal which would likely *weaken* that party's bargaining position if it were known, unless the agent has permission from the principal to disclose the information. . .". (Emphasis added). In subpart (c) the rule states ". . .the limited agent will be *required* to disclose information given to the agent in confidence by one of the parties if failure to disclose the information would be a *material misrepresentation* regarding the property or regarding the abilities of the parties to fulfill their obligations." (Emphasis added).

Under the rules, information the broker was told by the seller that would weaken the seller's bargaining position if the buyer knew it, cannot be told to the buyer, unless the failure to disclose the information would be a material misrepresentation. Under this rule, the broker is burdened with determining whether the information disclosed by the seller to the broker merely is information that if disclosed to the buyer, would weaken the seller's bargaining position and as such, the broker could not disclose it to the buyer; or, whether the information, if not disclosed to the buyer, would be a material misrepresentation and as such, requires the broker to disclose it to the buyer.

2. Duties Under the Agency Disclosure

The Agency Disclosure is not merely a restatement of the foregoing administrative rule. The obligation of disclosure imposed on limited agents is significantly different from the duties imposed by the administrative rule. The obligation

imposed upon the limited agents by the Agency Disclosure is "a fiduciary duty of ***utmost*** care, integrity, honesty and loyalty in dealings with the seller and the buyer"[8] (emphasis added) and the only limitation on that duty is that the limited agent ". . .may not, without the express permission of the respective party, disclose to the other party that the seller will accept a price less than the listing price or that the buyer will pay a price greater than the price offered."[9]

Under the standard in the administrative rule, if Consolidated had been told by WDCI that there were massive subsurface concrete structures, and if Consolidated determined that such information would weaken WDCI's bargaining position, but would not constitute a material misrepresentation if not told to the County, then Consolidated could not tell the County about the subsurface conditions.

By entering into the Agency Disclosure, however, Consolidated agreed to a more liberal standard of disclosure. Under the Agency Disclosure, Consolidated was required to disclose whatever it knew about the property (except the amount of money WDCI would take). This, of course, includes information disclosed to Consolidated by WDCI. The County exacted a higher standard of care from Consolidated under the Agency Disclosure than under the administrative rule where, under the rule, Consolidated had no duty to disclose to the County information that might weaken WDCI's bargaining

---

[8] Agency Disclosure, Record at p. 0170.

[9] *Id.*

position. The County's position was, therefore, clearly enhanced by the Agency Disclosure.

The fiduciary duties imposed on the limited agents by the Division of Real Estate's administrative rules are different from those imposed under the terms of the Agency Disclosure. The Agency Disclosure was signed by the limited agents, WDCI and the County (Brief of Appellees, page 7, paragraph 8), and was supported by adequate consideration in the form of a higher standard of care.

Moreover, the key relationship between a real estate broker and a client is *agency*. In *Wardley v. Welsh*, 962 P.2d 86 (Utah Ct. App. 1998), the Court of Appeals stated that "[A]gency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control. . .". In other words, "an agency is created and authority is actually conferred very much as a contract is made: a meeting of the minds must exist between the parties." *Wardley*, at 89. Consolidated's argument that independent common law and statutory duties apply because the Agency Disclosure is not a contract must fail.

POINT II

SALT LAKE COUNTY'S CLAIM IS BASED ON ITS CONTRACT WITH CONSOLIDATED AND IS NOT BARRED BY THE FOUR YEAR STATUTE OF LIMITATIONS.

Consolidated argues that the County's action is time-barred because the claim is in reality a tort, not a contract claim, and is subject to the four-year statute of limitations.

This argument contradicts the record and Utah case law addressing whether an action is founded upon a writing for statute of limitations purposes.

The applicable limitation[10] provides that: "[A]n action may be brought within six years: (2) upon any contract, obligation, or liability founded upon an instrument in writing . . .". The basis of the County's action is a "contract, obligation, or liability founded upon an instrument in writing" squarely within the plain meaning of the statute. Consolidated argues that the County's claim is in reality a tort claim because "those basic duties at issue in this appeal would have been owed to the buyer and seller because they were independently established by common law and the Utah Administrative Code Rules." (Brief of Appellees, page 21).

Consolidated relies on *Bracklein v. Realty Ins. Co.*, 80 P.2d 471 (Utah 1938) and *Brigham Young University v. Paulsen Const.*, 744 P.2d 1370 (Utah 1987) in support of its argument against the application of the six year statute of limitations. A close examination of each case, shows that the County's action is properly characterized as an action "founded upon an instrument in writing." First, in *Bracklein*, at 476, the Court considered "whether the obligation to pay a note and mortgage liability incurred by a grantee in a deed with an assumption clause [is] one founded on an instrument in writing?"

---

[10] Section 78-12-23(2), Utah Code Ann., 1953, as amended.

The Court explained:

> If the fact of liability arises or is assumed or imposed from the instrument itself, or its recitals, the liability is founded upon an instrument in writing. If the instrument acknowledges or states a fact from which the law implies an obligation to pay, such an obligation is founded upon a written instrument in writing. . . . So, also, is an action in which an instrument in writing itself contains the contract or promise to pay or do the thing, to compel the doing of which the action is brought. The promise must arise directly from the writing itself and be included in its terms. An obligation being established by a writing, a promise to pay or perform is implied. By necessary inference of law and fact such promise is embodied in the language of the writing although it may not be expressed in words.

Id. at 476.

In contrast, the *Bracklein* Court noted:

> A cause of action is not founded on a written instrument merely because it is indirectly connected with the instrument. And the fact that a writing may be a link in a chain of evidence establishing the liability is not sufficient to say the cause of action is founded on such writing, nor is a parol acceptance of a written offer, alone, sufficient, to make an agreement in writing within the statute.

Id.

In *Bracklein*, the Court ultimately found that the action was founded upon an instrument in writing, namely an assumption clause found in a deed, which the defendant did not sign. *Id.* at 476-77. Applying *Bracklein* to the instant case shows that the County's action is properly characterized as one "founded on an instrument in writing." Consolidated's promise arises from a written document which it signed. (Record at

00026). The County's claim is directly predicated upon the promise contained in the writing, and is not "indirectly connected with the instrument." (Record at 00026). Neither is the writing merely a "link in a chain of evidence establishing liability." It is the basis of liability itself. The writing contains particularized promises of performance from Consolidated in exchange for allowing Consolidated to act as a "dual agent."

Similarly, in *Brigham Young University v. Paulsen Const.*, 744 P.2d 1370 (Utah 1987), the Court found BYU's claim properly characterized as one based on written instruments. The Court re-stated the test originally established in *Bracklein*, that "if the fact of liability arises or is assumed or is imposed from the instrument itself, or its recitals, the liability is founded upon an instrument in writing." *Bracklein*, 80 P.2d at 476.

In *Paulsen*, BYU sued two of its general contractors when it discovered damaged pipes in its Missionary Training Center. BYU alleged that the general contractors "negligently allowed subcontractors to install pipe insulation material that did not conform to the project construction specifications." *Id.* at 1372. The Court found that this claim was properly based on contract because:

> [a]bsent the contractual obligations of [the general contractors] to BYU, [the general contractors] would have no obligation to supervise construction of the Missionary Training Center. Only the alleged breach of their contractual duties gives BYU any basis for asserting they are liable for the cost of replacing the pipes.

Id.

In a footnote to this conclusion, the Court observed that:

> BYU's allegation that [the general contractors] "negligently" failed to perform their contractual duties adds nothing to their cause of action; it certainly does not serve to convert this case into a tort action. A negligent failure to perform contractual duties is a breach of contract, not a tort.

Id. at 1372 n.1.

Similarly, in this case, Consolidated and the trial court seized upon the County's use of the phrase "negligence" to characterize its claim as founded in tort. Under *Paulsen*, this is not the appropriate inquiry. In *Ward v. Intermountain Farmers' Ass'n*, 907 P.2d 264, 267 (Utah 1995), the Court noted that plaintiff's "fact scenario could also give rise to a tort claim, it contains all the elements of a contract action. [The plaintiff] may, therefore, elect in this case to waive the tort and sue on the contract." In a footnote to the above quote, the Court cited approvingly the Restatement (Second) of Tort § 899, cmt. b (1979) which states that "[a]n act and its consequences may be both a tort and a breach of contract . . . . When this is so, the injured person, although barred by a statute from maintaining an action of tort may not be barred from enforcing his contractual . . . right or vice versa." The Court went on to note that "[t]his blackletter principle has been recognized and applied previously by this court." *Id.* at 267 n.2. In fact, the *Ward* Court cites the *Paulsen* case and characterizes its holding in *Paulsen* as follows: "holding that negligent failure to perform contractual duties may be brought as contract action and is not barred by tort statute of limitations." *Id.*

This rule serves the important public policy of allowing a party to have his or her day in court, rather than be deprived of a hearing on his or her claim simply because of potential ambiguity in the underlying nature of the claim as one in contract or tort. If the claim can legitimately be characterized as "founded in writing," which it clearly can in this case, then the Court should allow the County to proceed with its suit as a contract claim and allow the County its day in court to determine whether Consolidated met or breached its duties expressed in the writing which it signed.

Consolidated argues for an interpretation of *Paulsen* that contradicts the above-referenced rule. The County had two potential claims, a tort and contract claim. *Paulsen* does not mean that the County is deprived of its contract claim merely because there are other tort remedies the County may have utilized. The subsequent citation in *Ward* above casts significant doubt on Consolidated's interpretation of *Paulsen*.

POINT III

FAILURE TO OBTAIN A LISTING AGREEMENT SHOWS THAT CONSOLIDATED FAILED TO EXERCISE THE "UTMOST CARE" IN ITS DEALINGS WITH THE COUNTY

In Utah, it is unlawful for any person to act as a principal real estate broker, associate real estate broker, or a real estate sales agent without a license.[11] The Real Estate Division, pursuant to Section 61-2-6, Utah Code Ann., 1953 as amended, has established licensing procedures and requirements for brokers and agents. A broker or

[11] Section 61-2-1(1), Utah Code Ann., 1953 as amended.

agent's license may be suspended or revoked upon the failure to comply with the requirements established by the Real Estate Division. The purpose of the licensing requirement is to protect the public in the handling of real estate transactions. *Hagar v. Mobley*, 638 P.2d 127 (Wyo., 1981). The Real Estate Commission's rules set forth the specific fiduciary duties owed to seller and buyer principals. *Wardley Corp. v. Welsh*, 962 P.2d 86 (Utah Ct. App. 1998) at 89, n.3.

At the time of oral argument on the County's Motion to Alter or Amend Judgment, reference was made to correspondence from Martin, dated November 5, 1999, wherein he represented that no listing had ever been signed with the parties.[12] (Record, transcription 00663, pages 10 and 11). It was argued that had there been a listing agreement,[13] the broker and sales agent would have inquired regarding the condition of the property and its suitability for use. Reference was also made during the hearing to the deposition transcript of Mr. Lynn Cottrell, a representative of WDCI, who states it was his understanding that there *was* an arrangement with Consolidated for the sale of the property. (Record at 00515; and transcription 00663, pages 10 and 11). Moreover, the affidavit of Mr. Franks states that he was "retained" to represent the seller. (Record at

---

[12] Martin understood from Franks and Davis that the subject property of this litigation was *never* listed. Martin's Response to Plaintiff's First Set of Interrogatories, Answer to Interrogatory 13. (Record at 00253).

[13] Utah Administrative Code Rule 162-6-1.6.1.4 requires the real estate licensee completing a listing agreement to make reasonable efforts to verify the accuracy and content of the listing.

00077, paragraph 6; and 00102, paragraph 3). One is left to ponder the status of an agent who is "retained" in the absence of a listing under the administrative rules. At a minimum, the record documents a factual dispute regarding whether a listing existed and if so, whether the limited agents made reasonable efforts to verify its accuracy and content as required by the administrative rule. (Record, transcription 00663, page 11).

The County did undertake limited discovery against Consolidated prior to the entry of the court's order granting summary judgment. The County submitted interrogatories and request for production of documents to Davis, Franks and Martin regarding the procedures followed by Consolidated in the course of its usual real estate business transactions. (Record at 00251, interrogatory 16; and 00253, interrogatory 13).

Apparently, because there was no listing, Consolidated failed to require WDCI to complete forms[14] typically required from a seller disclosing conditions on the property. This failure was a deviation from both the usual business transaction procedures of Consolidated and the administrative rules.

The failure to require a Listing Agreement precludes any type of finding that there was **no evidence** that Consolidated breached the applicable standard of care. This would be true even if the standard of care were "ordinary care," however, Consolidated

---

[14] The forms used by Consolidated were produced by Defendant Davis (Record at 00236) in response to the County's Request for Production of Documents. The forms are not contained in the District Court's record, but include: "Exclusive Authorization of Sale", "Real Estate Purchase Contract", "Sale and/or Lease Hazardous Materials Warnings Disclosure", "Sellers Property Disclosure", and "Closed Deal Bookings Package".

contractually agreed to exercise the "utmost care." It can certainly be argued now that the failure to obtain a Listing Agreement from WDCI, which would have required WDCI to provide Consolidated with pertinent information about the property, is evidence of a breach of the standard of care.[15]

Consolidated may argue that WDCI still would not have disclosed the conditions under a Listing Agreement, but this argument goes to causation, not duty or breach. It further raises the additional question, relevant to breach of its duty; i.e., whether it made any efforts at all, never mind reasonable efforts, to verify the contents of the "listing." The trial court's ruling and Consolidated's motion were based on duty and breach, not causation.

Even if it were true that Consolidated was ignorant of the subsurface conditions or anything that would lead them to believe in the existence of the subsurface conditions, this would have little bearing on whether they exercised the "utmost care." Certainly, if they knew about the conditions and said nothing, they would have breached their duty of utmost care. However, outright deception is not the only conduct to breach the "utmost care" standard. If they failed to ask questions a real estate expert would ask, if they failed to recommend acts a real estate expert would recommend, then this would breach the standard of "utmost care."

---

[15] The Real Estate Commission's determination of "competency" under the statute and rules is a "mixed question of law and fact." *In the Matter of the License of Nick Topik*, 761 P.2d 32 (Utah Ct. App. 1988). The issue of competency involves issues of fact which precludes summary judgment.

POINT IV

CONSOLIDATED'S FIDUCIARY DUTIES ARE NOT DIMINISHED BY THE COUNTY'S RESOURCES

Consolidated argues that the County's "sophistication" including staff and resources, was sufficient to make reasonable inquiry and to perform its own due diligence. (Brief of Appellees, pages 18 to 21). This argument fails, however, because Consolidated's fiduciary duties are not reduced by the County's capabilities. The duties imposed upon Consolidated by statute, administrative rules and the Agency Disclosure are unconditional.

A professional duty of care cannot be based on a sliding scale dependent on the relative sophistication of the parties. For example, the County often hires attorneys to act as its counsel in various matters. The County also has a sizeable in-house legal staff. This circumstance would not give an attorney hired by the County license to commit malpractice. A contract attorney could not argue that the County's in-house attorneys should have caught an error because they are many, or they are equally qualified. The size of the client is not a license to commit malpractice, whether in the legal realm or in real estate.

In support of its argument, Consolidated alleges that: (1) the County, by its attorneys, "drafted" the Real Estate Purchase Contract dated on or about December 24, 1993. (Brief of Appellees, Statement of Relevant Facts, paragraph 7, page 6); and (2) the engineering firm of Eckhoff, Watson and Preator was ". . .*hired* by the County to perform

soils assessment on the property for analysis of prior contamination. (Emphasis added). At least six (6) soil borings to twelve (12) feet deep were performed on the property." (Brief of Appellees, paragraph 12, pages 8 and 20). A review of the record shows these allegations and Consolidated's implications are drastically in error.

A. The Eckhoff, Watson and Preator report was written for WDCI, not the County

The written report prepared by Eckhoff, Watson and Preator, dated October 12, 1989, was made under a contract with **WDCI**, *not* the County. (Record at 00005, paragraph 25; Response to Interrogatory No. 15, at 00285). The report is dated four years *before* the County considered the property as a possible construction site. (Record at 00004, paragraph 15). Consolidated's Brief implies, however, that the County hired Eckhoff, Watson and Preator to locate footings, foundations or other subsurface structures, and that Eckhoff, Watson and Preator provided the report to the County in *1989* as part of the preacquisition due diligence. In fact, this report was provided to the County by WDCI sometime *after* the December 24, 1993, offer. (Record at 00005, paragraph 25, and 00028; Brief of Appellees, page 7, paragraph 9). The report documents the removal of underground storage tanks for WDCI and removal of petroleum contaminated soil around the tanks. (Record at 00028 and 00094). It has no bearing whatsoever on Consolidated's breach of its contractual duties.

B. The County Did Not "Draft" The Real Estate Purchase Contract

The Real Estate Purchase Contract is a standard pre-printed form approved by

the Salt Lake Board of Realtors. (Record at 00022 to 00024). A review of the form by the County Attorney's Office was merely to confirm the appropriate blanks on the form were filled in and that it was a lawful agreement. The County did not "draft" the contract as implied by Consolidated.

C. The County Did Not Have An Opportunity To Discover What "Others" At Consolidated May Have Known.

The statement of relevant facts in Consolidated's Brief states, "Neither Franks *nor anyone at Consolidated* was aware of or had ever been led to believe there were subsurface concrete and waste pilings, footings, slabs, debris or other material under the surface of the property." (Brief of Appellees, paragraph 2, page 5). It should be noted, however, that the record contains no information regarding what anyone else at Consolidated knew about the property, other than Martin, Franks and Davis. The County did not have an opportunity to discover what "others" at Consolidated may have known because the trial court denied its Rule 56(f) Motion for additional time.

Consolidated has failed to marshal facts sufficient to establish that the County had special knowledge, sophistication or expertise to such an extent that it was equivalent to prior notice of the undisclosed subsurface conditions. The County certainly does not deny that it performed a reasonable amount of preacquisition due diligence prior to closing. It did not, however, have the type of information, independent knowledge or degree of control over the transaction as implied in Consolidated's Brief.

POINT V

THE TRIAL COURT IMPROPERLY DENIED THE COUNTY'S RULE 56(f) MOTION

In response to Salt Lake County's Complaint, Consolidated filed a Motion to Dismiss which was accompanied by affidavits of the individual defendants denying any knowledge of the subsurface conditions at issue in this case. The County, in addition to a substantive response to the motion, filed a Rule 56(f) Motion seeking the opportunity to conduct further discovery. The trial court denied the County's Rule 56(f) Motion without explanation.

On appeal, Consolidated attempts to justify the trial court's decision by astonishingly arguing that "the most that Salt Lake County could hope for is an opportunity to discredit the statements made by Martin, Franks and Davis in their affidavits." (Brief of Appellees, page 27). Certainly, if the County could accomplish so little, the purpose of Rule 56(f) would have been served. The statements in the affidavits were the foundation of Consolidated's motion and the trial court's later ruling. In essence, the trial court enabled Consolidated to win the case by allowing the defendants to file affidavits denying the allegations contained in the Complaint, but denying plaintiff the opportunity to cross-examine the defendants. No case should be resolved by the sworn testimony of a party, absent the opportunity to examine the basis and foundation for the assertions which deny the County's day in court. Such a ruling does not promote the interests of justice, and is inconsistent with Rule 56(f).

Consolidated also references the County's efforts at formal and informal discovery. First, the County's efforts at *informal* discovery is irrelevant. Rule 56(f) is a rule by which a party seeks the court's permission to conduct further formal discovery. There is never any bar on conducting informal discovery. Second, it is true that the County did conduct some formal discovery. This consisted of written interrogatories and requests for production of documents on both WDCI and Consolidated. (Record at 00219 to 00233). It is not dilatory to first obtain what documents the opposing party has prior to conducting any depositions. Indeed, it would be folly to have conducted any depositions in this case prior to obtaining and reviewing all documents available through discovery. While it is true Consolidated complied with the County's written discovery requests, the responses were filed late,[16] only weeks before the hearing on the Motion to Dismiss. However, the Rule 56(f) Motion was primarily to obtain the depositions of the individual defendants. (Record at 00149, paragraph 12). By its opposition to the County's Rule 56(f) Motion, Consolidated denied the County the opportunity to do this.[17] No where does Consolidate represent that it would have made its individual defendants available for a deposition.

The law under Rule 56(f) is well-settled and the facts, as they relate to this issue, are

---

[16] The Certificate of Service on Plaintiff's First Set of Interrogatories and Request for Production of Documents to Consolidated is dated October 20, 1998. (Record at 00219). The Certificate of Service on Consolidated's responses is dated January 7, 1999. (Record at 00236 to 00243).

[17] The County did depose a WDCI official as well as a non-party. (Record at 00326 and 00422). Consolidated elected not to participate.

not in dispute. The County submits that its motion should have been granted so that it could have deposed the individual Consolidated defendants on the statements which formed the basis not only of Consolidated's motion, but the trial court's ruling disposing of the County's complaint.

CONCLUSION

For the reasons set forth in the County's principal brief and the reasons set forth herein, the County requests that: (1) the trial court's Order denying the County's Rule 56(f) Motion be reversed and the County be allowed to conduct additional discovery against Consolidated; and (2) the trial court's grant of Summary Judgment in favor of Consolidated be reversed and the County be allowed to proceed with its claims against Consolidated.

DATED this 27 day of March, 2001.

DAVID E. YOCOM
Salt Lake County District Attorney

By _____
CRAIG W. ANDERSON
Deputy District Attorney
Attorney for Appellant

MAILING CERTIFICATE

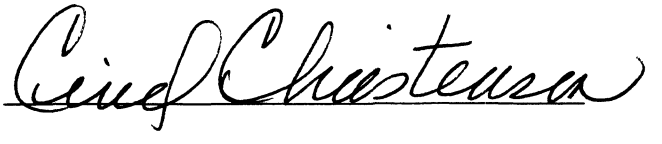
I hereby certify that on the 27 day of March, 2001, two true and correct copies of the foregoing Reply Brief was mailed, postage prepaid, to the following:

Mark J. Williams
PLANT, WALLACE, CHRISTENSEN & KANELL, P.C.
136 East South Tempe, Suite 1700
Salt Lake City, Utah 84111

Attorney for Defendants/Respondents Consolidated Realty Group,
William K. Martin, Jr., Herman L. Franks and
Charles L. Davis

Robert L. Stolebarger
HOLME ROBERTS & OWEN
111 East Broadway, Suite 1100
Salt Lake City, Utah 84111

Attorney for Defendant WDCI



WDCI.wpd

ADDENDUM

A. Agency Disclosure

B. Rule R162-6-1 Utah Administrative Code

C. Rule R162-6-2 Utah Administrative Code

D. Section 61-2-1 Utah Code Ann., 1953 as amended

E. Section 61-2-6 Utah Code Ann., 1953 as amended

F. Section 78-12-23 Utah Code Ann., 1953 as amended

G. Rule 56(f) Utah Rules of Civil Procedure

H. Restatement (Second) of Torts § 899, comment "b"

ADDENDUM
A

AGENCY DISCLOSURE

THIS DISCLOSURE FORM IS INTENDED FOR USE BY REAL ESTATE LICENSEES IN DISCLOSING AGENCY RELATIONSHIP(S) TO BUYER AND SELLER

When you enter into a discussion with a real estate agent regarding a real estate transaction, you should, from the outset, understand who the real estate agent is representing in the transaction. More importantly, you should understand how that agency relationship impacts your business relationship with the real estate agent and the Buyer or Seller.

Duties of Seller's Agent

A real estate agent who has listed a Seller's property for sale acts as the agent for the Seller only and has a fiduciary duty of loyalty to the Seller. In practical terms, the Seller has hired the agent to sell their property and that agent should attempt to obtain for the Seller the most favorable sales price and terms. Although the Seller's agent has this fiduciary duty to the Seller, that agent is, by law, responsible to all prospective Buyers to treat them with honesty, fair dealing, and with good faith. A Seller's agent under a listing agreement with Seller acts as the agent for the Seller only. A seller's agent or a subagent of that agent has the following affirmative obligations: (To the Seller) A fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with the Seller; (To the Buyer and the Seller) (a) A duty to exercise reasonable care, skills, and diligence in performance of the agent's duties; (b) A duty of honesty and fair dealing with good faith; (c) A duty to disclose all facts known to the agent which materially affect the property that are not known to, or within the diligent attention and observation of, the parties.

Duties of Buyer's Agent

A real estate agent can, with a Buyer's written consent, defining how the agent will be paid, agree to act as agent for the Buyer only. As agent working on behalf of the Buyer, the agent has a fiduciary duty of loyalty to the Buyer. In practical terms, that means the Buyer's agent is concerned with the Buyer's best interests in the transaction, including attempting to obtain for the Buyer the most favorable sales price and terms. A selling agent can, with a Buyer's consent, agree to act as agent for the Buyer only. In these situations, the agent is not the Seller's agent, even if by agreement the agent may receive a commission from the Seller. An agent acting only for the Buyer has the following affirmative obligations: (To the Buyer) (a) A fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with the Seller; (To the Buyer and the Seller) (a) A duty to exercise reasonable care skills and diligence in performance of the agent's duties; (b) A duty of honesty and fair dealing with good faith; (c) A duty to disclose all facts known to the agent which materially affect the value of property that are not known to or within the diligent attention and observation of the parties.

Duties of Agent Representing both Buyer and Seller

A real estate agent, either acting directly or though one or more associate licensees, may legally be the agent of both the Seller and the Buyer in a transaction, but only with the knowledge and consent of both the Seller and the Buyer. In a dual agency situation, the agent has the following affirmative obligations to both the Seller and the Buyer: (a) A fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with the Seller and the Buyer; (b) Other duties to the Seller and the Buyer as stated above in their respective sections. In representing both Seller and Buyer, the agent may not, without the express permission of the respective party, disclose to the other party that the Seller will accept a price less than the listing price or that the Buyer will pay a price greater than the price offered.

Duties of Buyer and Seller

The above duties of real estate agents in a real estate transaction do not relieve a Seller or a Buyer from the responsibility to exercise good business judgment in protecting their respective interests. You should carefully read all agreements to assure that they adequately express your understanding of the transaction. If legal or tax advice is desired, consult a competent professional attorney or accountant.

Confirmation of Agency Disclosure

At the signing of this agreement, the following agency relationship(s) is/are hereby confirmed for the transaction.

The real estate agent: CONSOLIDATED BANK Group is the agent of (circle one which applies) Seller Buyer Buyer & Seller

(Signature of Licensee)

Acknowledgement

I/we acknowledge receipt of a copy of this disclosure and confirmation, and understand and agree with the agency relationship confirmed herein.

BUYER/SELLER W Scottwell, VP Date 24 Dec 93 Time _____ AM/PM

BUYER/SELLER _____ Date _____ Time _____ AM/PM

AGENT _____ By _____ Date _____

ADDENDUM
B

R162-6-1. Improper Practices.

6.1.1. False devices. A licensee shall not propose, prepare, or cause to be prepared any document, agreement, closing statement, or any other device or scheme, which does not reflect the true terms of the transaction, nor shall a licensee knowingly participate in any transaction in which a similar device is used.

6.1.1.1. Loan Fraud. A licensee shall not participate in a transaction in which a buyer enters into any agreement that is not disclosed to the lender, which, if disclosed, may have a material effect on the terms or the granting of the loan.

6.1.1.2. Double Contracts. A licensee shall not use or propose the use of two or more purchase agreements, one of which is not made known to the prospective lender or loan guarantor.

6.1.2. Signs. It is prohibited for any licensee to have a sign on real property without the written consent of the property owner.

6.1.3. Licensee's Interest in a Transaction. A licensee shall not buy, sell, or lease or rent any real property as a principal, either directly or indirectly, without first disclosing in writing on the purchase agreement or the lease or rental agreement his true position as principal in the transaction. A licensee will be considered to be a principal for the purposes of this rule if he is an owner, officer, director, partner, member, or employee of an entity which is a principal in the transaction. In the case of a licensee who is a stockholder but who is not an officer, director or employee of a corporation which is a principal in the transaction, the licensee will be considered to be a principal for the purposes of this rule if he owns more than 10% of the stock of the corporation.

6.1.4. Listing Content. The real estate licensee completing a listing agreement is responsible to make reasonable efforts to verify the accuracy and content of the listing.

6.1.4.1. Net listings are prohibited and shall not be taken by a licensee.

6.1.5. Advertising. This rule applies to all advertising materials, including newspaper, magazine, Internet, e-mail, radio, and television advertising, direct mail promotions, business cards, door hangers, and signs.

6.1.5.1. Any advertising by active licensees that does not include the name of the real estate brokerage as shown on Division records is prohibited except as otherwise stated herein.

6.1.5.2 If the licensee advertises property in which he has an ownership interest and the property is not listed, the ad need not appear over the name of the real estate brokerage if the ad includes the phrase "owner-agent" or the phrase "owner-broker".

6.1.5.3. Names of individual licensees may be advertised in addition to the brokerage name. If the names of individual licensees are included in advertising, the brokerage must be identified in a clear and conspicuous manner. This requirement may be satisfied by identifying the brokerage in lettering which is at least one-half the size of the lettering which identifies the individual licensees.

6.1.5.4. Advertising teams, groups, or other marketing entities which are not licensed as brokerages is prohibited if the advertising states "owner-agent" or "owner-broker" instead of the brokerage name.

6.1.5.5. Advertising teams, groups, or other marketing entities which are not licensed as brokerages is permissible in advertising which includes the brokerage name upon the following

© 2001 Matthew Bender & Company, Inc., a member of the Lexis-Nexis® Group. All rights reserved

conditions:

(a) The brokerage must be identified in a clear and conspicuous manner. This requirement may be satisfied by identifying the brokerage in lettering which is at least one-half the size of the lettering which identifies the team, group, or other marketing entity; and

(b) The advertising shall clearly indicate that the team, group, or other marketing entity is not itself a brokerage and that all licensees involved in the entity are affiliated with the brokerage named in the advertising.

6.1.5.6 If any photographs of personnel are used, the actual roles of any individuals who are not licensees must be identified in terms which make it clear that they are not licensees.

6.1.5.7. Any artwork or text which states or implies that licensees have a position or status other than that of sales agent or associate broker affiliated with a brokerage is prohibited.

6.1.5.8. Under no circumstances may a licensee advertise or offer to sell or lease property without the written consent of the owner of the property or the listing broker. Under no circumstances may a licensee advertise or offer to sell or lease property at a lower price than that listed without the written consent of the seller or lessor.

6.1.5.9 If an active licensee advertises to purchase or rent property, all advertising must contain the name of the licensee's real estate brokerage as shown on Division records.

6.1.6. Double Commissions. In order to avoid subjecting the seller to paying double commissions, licensees must not sell listed properties other than through the listing broker. A licensee shall not subject a principal to paying a double commission without the principal's informed consent.

6.1.6.1. A licensee shall not enter or attempt to enter into a concurrent agency representation agreement with a buyer or a seller, a lessor or a lessee, when the licensee knows or should know of an existing agency representation agreement with another licensee.

6.1.7. Retention of Buyer's Deposit. A principal broker holding an earnest money deposit shall not be entitled to any of the deposit without the written consent of the buyer and the seller.

6.1.8. Unprofessional conduct. No licensee shall engage in any of the practices described in Section 61-2-2, et seq., whether acting as agent or on his own account, in a manner which fails to conform with accepted standards of the real estate sales, leasing or management industries and which could jeopardize the public health, safety, or welfare and includes the violation of any provision of Section 61-2-2, et seq. or the rules of this chapter.

6.1.9. Finder's Fees. A licensee may not pay a finder's fee or give any valuable consideration to an unlicensed person or entity for referring a prospect in a real estate transaction, except as provided in this rule.

6.1.9.1. Token gifts. A licensee may give a gift valued at $50 or less to an individual in appreciation for an unsolicited referral of a prospect which resulted in a real estate transaction.

6.1.10. Referral fees from lenders. A licensee may not receive a referral fee from a lender.

6.1.11. Failure to have written agency agreement. To avoid representing more than one party without the informed consent of all parties, principal brokers and licensees acting on their behalf shall have written agency agreements with their principals. The failure to define an agency relationship in writing will be considered unprofessional conduct and grounds for disciplinary action by the Division.

6.1.11.1. A principal broker and licensees acting on his behalf who represent a seller shall have a written agency agreement with the seller defining the scope of the agency.

© 2001 Matthew Bender & Company, Inc., a member of the Lexis-Nexis® Group. All rights reserved

6.1.11.2. A principal broker and licensees acting on his behalf who represent a buyer shall have a written buyer agency agreement with the buyer defining the scope of the agency.

6.1.11.3. A principal broker and licensees acting on his behalf who represent both buyer and seller shall have written agency agreements with both buyer and seller which define the scope of the limited agency and which demonstrate that the principal broker has obtained the informed consent of both buyer and seller to the limited agency as set forth in Section R162-6.2.16.3.1.

6.1.11.4. A licensee affiliated with a brokerage other than the listing brokerage who wishes to act as a sub-agent for the seller, shall, prior to showing the seller's property:

(a) obtain permission from the principal broker with whom he is affiliated to act as a sub-agent;

(b) notify the listing brokerage that sub-agency is requested;

(c) enter into a written agreement with the listing brokerage consenting to the sub-agency and defining the scope of the agency; and

(d) obtain from the listing brokerage all information about the property which the listing brokerage has obtained.

6.1.11.5. A principal broker and licensees acting on his behalf who act as a property manager shall have a written property management agreement with the owner of the property defining the scope of the agency.

6.1.11.6. A principal broker and licensees acting on his behalf who represent a tenant shall have a written agreement with the tenant defining the scope of the agency.

© 2001 Matthew Bender & Company, Inc , a member of the Lexis-Nexis® Group All rights reserved

ADDENDUM
C

R162-6-2. Standards of Practice.

6.2.1. Approved Forms. The following standard forms are approved by the Utah Real Estate Commission and the Office of the Attorney General for use by all licensees:

(a) September 30, 1999, Real Estate Purchase Contract (mandated use of this form is July 1, 2000);

(b) January 1, 1999 Real Estate Purchase Contract for Residential Construction;

(c) January 1, 1987, Uniform Real Estate Contract;

(d) October 1, 1983, All Inclusive Trust Deed;

(e) October 1, 1983, All Inclusive Promissory Note Secured by All Inclusive Trust Deed;

(f) January 1, 1999, Addendum/Counteroffer to Real Estate Purchase Contract;

(g) January 1, 1999, Seller Financing Addendum to Real Estate Purchase Contract;

(h) January 1, 1999, Survey Addendum to Real Estate Purchase Contract;

(i) January 1, 1999, Buyer Financial Information Sheet;

(j) January 1, 1999, FHA/VA Loan Addendum to Real Estate Purchase Contract;

(k) January 1, 1999, Assumption Addendum to Real Estate Purchase Contract;

(l) January 1, 1999, Lead-based Paint Addendum to Real Estate Purchase Contract;

(m) January 1, 1999, Disclosure and Acknowledgment Regarding Lead-based Paint and/or Lead-based Paint Hazards.

6.2.1.1. Forms Required for Closing. Principal brokers and associate brokers may fill out forms in addition to the standard state-approved forms if the additional forms are necessary to close a transaction. Examples include closing statements, and warranty or quit claim deeds.

6.2.1.2. Forms Prepared by an Attorney. Any licensee may fill out forms prepared by the attorney for the buyer or lessee or the attorney for the seller or lessor to be used in place of any form listed in R162-6.2.1 (a) through (g) if the buyer or lessee or the seller or lessor requests that other forms be used and the licensee verifies that the forms have in fact been drafted by the attorney for the buyer or lessee, or the attorney for the seller or lessor.

6.2.1.3. Additional Forms. If it is necessary for a licensee to use a form for which there is no state-approved form, for example, the licensee may fill in the blanks on any form which has been prepared by an attorney, regardless of whether the attorney was employed for the purpose by the buyer, seller, lessor, lessee, brokerage, or an entity whose business enterprise is selling blank legal forms.

6.2.1.4. Standard Supplementary Clauses. There are Standard Supplementary Clauses approved by the Utah Real Estate Commission which may be added to Real Estate Purchase Contracts by all licensees. The use of the Standard Supplementary Clauses will not be considered the unauthorized practice of law.

6.2.2. Copies of Agreement. After a purchase agreement is properly signed by both the buyer and seller, it is the responsibility of each participating licensee to cause copies thereof, bearing all signatures, to be delivered or mailed to the buyer and seller with whom the licensee is dealing. The licensee preparing the document shall not have the parties sign for a final copy of the document prior to all parties signing the contract evidencing agreement to the terms thereof. After a lease is properly signed by both landlord and tenant, it is the responsibility of the principal broker to cause copies of the lease to be delivered or mailed to the landlord or tenant with whom the brokerage or property management company is dealing.

© 2001 Matthew Bender & Company, Inc , a member of the Lexis-Nexis® Group All rights reserved

6.2.3. Residential Construction Agreement. The Earnest Money Sales Agreement for Residential Construction must be used for all transactions for the construction of dwellings to be built or presently under construction for which a Certificate of Occupancy has not been issued.

6.2.4. Employee Licensee. A real estate licensee working as a regular salaried employee as defined in section 1 of these rules, who sells real estate owned by the employer or leases real estate owned by the employer, may only do so and may only be compensated directly by the employer under one of the following conditions: (1) the licensee is a principal broker; (2) the employer has on its staff a principal broker with whom the licensee affiliates for sales or management transactions; or (3) the employer contracts with a principal broker so that all employed licensees are affiliated with and supervised by a principal broker.

6.2.5. Real Estate Auctions. A principal broker who contracts or in any manner affiliates with an auctioneer or auction company which is not licensed under the provisions of Section 61-2-1 et seq. for the purpose of enabling that auctioneer or auction company to auction real property in this state, shall be responsible to assure that all aspects of the auction comply with the requirements of this section and all other laws otherwise applicable to real estate licensees in real estate transactions. Auctioneers and auction companies who are not licensed under the provisions of Section 61-2-1 et seq. may conduct auctions of real property located within this state upon the following conditions:

6.2.5.1. Advertising. All advertising and promotional materials associated with an auction must conspicuously disclose that the auction is conducted under the supervision of a named principal broker licensed in this state; and

6.2.5.2. Supervision. The auction must be conducted under the supervision of a principal broker licensed in this state who must be present at the auction; and

6.2.5.3. Use of Approved Forms. Any purchase agreements used at the auction must meet the requirements of Section 61-2-20 and must be filled out by a Utah real estate licensee; and

6.2.5.4. Placement of Deposits. All monies deposited at the auction must be placed either in the real estate trust account of the principal broker who is supervising the auction or in an escrow depository agreed to in writing by the parties to the transaction.

6.2.5.5. Closing Arrangements. The principal broker supervising the auction shall be responsible to assure that adequate arrangements are made for the closing of each real estate transaction arising out of the auction.

6.2.6. Guaranteed Sales. As used herein, the term "guaranteed sales plan" includes: (a) any plan in which a seller's real estate is guaranteed to be sold or; (b) any plan whereby a licensee or anyone affiliated with a licensee will purchase a seller's real estate if it is not purchased by a third party in the specified period of a listing or within some other specified period of time.

6.2.6.1. In any real estate transaction involving a guaranteed sales plan, the licensee shall provide full disclosure as provided herein regarding the guarantee:

(a) Written Advertising. Any written advertisement by a licensee of a "guaranteed sales plan" shall include a statement advising the seller that if the seller is eligible, costs and conditions may apply and advising the seller to inquire of the licensee as to the terms of the guaranteed sales agreement. This information shall be set forth in print at least one-fourth as large as the largest print in the advertisement.

(b) Radio/Television Advertising. Any radio or television advertisement by a licensee of a "guaranteed sales plan" shall include a conspicuous statement advising if any conditions and

© 2001 Matthew Bender & Company, Inc , a member of the Lexis-Nexis® Group All rights reserved

limitations apply.

(c) Guaranteed Sales Agreements. Every guaranteed sales agreement must be in writing and contain all of the conditions and other terms under which the property is guaranteed to be sold or purchased, including the charges or other costs for the service or plan, the price for which the property will be sold or purchased and the approximate net proceeds the seller may reasonably expect to receive.

6.2.7. Agency Disclosure. In every real estate transaction involving a licensee, as agent or principal, the licensee shall clearly disclose in writing to his respective client(s) or any unrepresented parties, his agency relationship(s). The disclosure shall be made prior to the parties entering into a binding agreement with each other. The disclosure shall become part of the permanent file.

6.2.7.1. When a binding agreement is signed in a sales transaction, the prior agency disclosure shall be confirmed in the currently approved Real Estate Purchase Contract or, with substantially similar language, in a separate provision incorporated in or attached to that binding agreement.

6.2.7.2. When a lease or rental agreement is signed, a separate provision shall be incorporated in or attached to it confirming the prior agency disclosure. The agency disclosure shall be in the form stated in R162-6.2.7.1, but shall substitute terms applicable for a rental transaction for the terms "buyer", "seller", "listing agent", and "selling agent".

6.2.7.3. Disclosure to other agents. An agent who has established an agency relationship with a principal shall disclose who he or she represents to another agent upon initial contact with the other agent.

6.2.8. Duty to Inform. Sales agents and associate brokers must keep their principal broker or branch broker informed on a timely basis of all real estate transactions in which the licensee is involved, as agent or principal, in which the licensee has received funds on behalf of the principal broker or in which an offer has been written.

6.2.9. Broker Supervision. Principal brokers and associate brokers who are branch brokers shall be responsible for exercising active supervision over the conduct of all licensees affiliated with them.

6.2.9.1. A broker will not be held responsible for inadequate supervision if:

(a) An affiliated licensee violates a provision of Section 61-2-1, et seq., or the rules promulgated thereunder, in contravention of the supervising broker's specific written policies or instructions; and

(b) Reasonable procedures were established by the broker to ensure that licensees receive adequate supervision and the broker has followed those procedures; and

(c) Upon learning of the violation, the broker attempted to prevent or mitigate the damage; and

(d) The broker did not participate in the violation; and

(e) The broker did not ratify the violation; and

(f) The broker did not attempt to avoid learning of the violation.

6.2.9.2. The existence of an independent contractor relationship or any other special compensation arrangement between the broker and affiliated licensees shall not release the broker and licensees of any duties, obligations, or responsibilities.

6.2.10. Disclosure of Fees. If a real estate licensee who is acting as an agent in a transaction

© 2001 Matthew Bender & Company, Inc , a member of the Lexis-Nexis® Group All rights reserved

will receive any type of fee in connection with a real estate transaction in addition to a real estate commission, that fee must be disclosed in writing to all parties to the transaction.

6.2.11. Fees from Builders. All fees paid to a licensee for referral of prospects to builders must be paid to the licensee by the principal broker with whom he is licensed and affiliated. All fees must be disclosed as required by R162-6.2.10.

6.2.12. Fees from Manufactured Housing Dealers. If a licensee refers a prospect to a manufactured home dealer or a mobile home dealer, under terms as defined in Section 58-56-1, et seq., any fee paid for the referral of a prospect must be paid to him by the principal broker with whom he is licensed.

6.2.13. Gifts and Inducements. A gift given by a principal broker to a buyer or seller, lessor or lessee, in a real estate transaction as an inducement to use the services of a real estate brokerage, or in appreciation for having used the services of a brokerage, is permissible and is not an illegal sharing of commission. If an inducement is to be offered to a buyer or seller, lessor or lessee, who will not be obligated to pay a real estate commission in a transaction, the principal broker must obtain from the party who will pay the commission written consent that the inducement be offered.

6.2.14. "Due-On-Sale" Clauses. Real estate licensees have an affirmative duty to disclose in writing to buyers and sellers the existence or possible existence of a "due-on-sale" clause in an underlying encumbrance on real property, and the potential consequences of selling or purchasing a property without obtaining the authorization of the holder of the underlying encumbrance.

6.2.15. Personal Assistants. With the permission of the principal broker with whom the licensee is affiliated, the licensee may employ an unlicensed individual to provide services in connection with real estate transactions which do not require a real estate license, including the following examples:

(a) Clerical duties, including making appointments for prospects to meet with real estate licensees, but only if the contact has been initiated by the prospect and not by the unlicensed person;

(b) At an open house, distributing preprinted literature written by a licensee, so long as a licensee is present and the unlicensed person furnishes no additional information concerning the property or financing and does not become involved in negotiating, offering, selling or filling in contracts;

(c) Acting only as a courier service in delivering documents, picking up keys, or similar services, so long as the courier does not engage in any discussion of, or filling in of, the documents;

(d) Placing brokerage signs on listed properties;

(e) Having keys made for listed properties; and

(f) Securing public records from the County Recorders' Offices, zoning offices, sewer districts, water districts, or similar entities.

6.2.15.1. If personal assistants are compensated for their work, they shall be compensated at a predetermined rate which is not contingent upon the occurrence of real estate transactions. Licensees may not share commissions with unlicensed persons who have assisted in transactions by performing the services listed in this rule.

6.2.15.2. The licensee who hires the unlicensed person will be responsible for supervising

© 2001 Matthew Bender & Company, Inc , a member of the Lexis-Nexis® Group All rights reserved

the unlicensed person's activities, and shall ensure that the unlicensed person does not perform activity which requires a real estate license.

6.2.15.3. Unlicensed individuals may not engage in telephone solicitation or other activity calculated to result in securing prospects for real estate transactions, except as provided in R162-6.2.15.(a) above.

6.2.16. Fiduciary Duties. A principal broker and licensees acting on his behalf owe the following fiduciary duties to the principal:

6.2.16.1. Duties of a seller's or lessor's agent. A principal broker and licensees acting on his behalf who act solely on behalf of the seller or the lessor owe the seller or the lessor the following fiduciary duties:

(a) Loyalty, which obligates the agent to act in the best interest of the seller or the lessor instead of all other interests, including the agent's own;

(b) Obedience, which obligates the agent to obey all lawful instructions from the seller or lessor;

(c) Full disclosure, which obligates the agent to tell the seller or lessor all material information which the agent learns about the buyer or lessee or about the transaction;

(d) Confidentiality, which prohibits the agent from disclosing any information given to the agent by the seller or lessor which would likely weaken the seller's or lessor's bargaining position if it were known, unless the agent has permission from the seller or lessor to disclose the information. This duty does not require the agent to withhold any known material fact concerning a defect in the property or the seller's or lessor's ability to perform his obligations;

(e) Reasonable care and diligence;

(f) Holding safe and accounting for all money or property entrusted to the agent; and

(g) Any additional duties created by the agency agreement.

6.2.16.2. Duties of a buyer's or lessee's agent. A principal broker and licensees acting on his behalf who act solely on behalf of the buyer or lessee owe the buyer or lessee the following fiduciary duties:

(a) Loyalty, which obligates the agent to act in the best interest of the buyer or lessee instead of all other interests, including the agent's own;

(b) Obedience, which obligates the agent to obey all lawful instructions from the buyer or lessee;

(c) Full Disclosure, which obligates the agent to tell the buyer or lessee all material information which the agent learns about the property or the seller's or lessor's ability to perform his obligations;

(d) Confidentiality, which prohibits the agent from disclosing any information given to the agent by the buyer or lessee which would likely weaken the buyer's or lessee's bargaining position if it were known, unless the agent has permission from the buyer or lessee to disclose the information. This duty does not permit the agent to misrepresent, either affirmatively or by omission, the buyer's or lessee's financial condition or ability to perform;

(e) Reasonable care and diligence;

(f) Holding safe and accounting for all money or property entrusted to the agent; and

(g) Any additional duties created by the agency agreement.

6.2.16.3. Duties of a limited agent. A principal broker and licensees acting on his behalf who act as agent for both seller and buyer, or lessor and lessee, commonly referred to as "dual

© 2001 Matthew Bender & Company, Inc , a member of the Lexis-Nexis® Group All rights reserved

agents," are limited agents since the fiduciary duties owed to seller and to buyer, or to lessor and lessee, are inherently contradictory. A principal broker and licensees acting on his behalf may act in this limited agency capacity only if the informed consent of both buyer and seller, or lessor and lessee, is obtained.

6.2.16.3.1. In order to obtain informed consent, the principal broker or a licensee acting on his behalf shall clearly explain to both buyer and seller, or lessor and lessee, that they are each entitled to be represented by their own agent if they so choose, and shall obtain written agreement from both parties that they will each be giving up performance by the agent of the following fiduciary duties:

(a) The principal broker or a licensee acting on his behalf shall explain to buyer and seller, or lessor and lessee, that they are giving up their right to demand undivided loyalty from the agent, although the agent, acting in this neutral capacity, shall advance the interest of each party so long as it does not conflict with the interest of the other party. In the event of conflicting interests, the agent will be held to the standard of neutrality; and

(b) The principal broker or a licensee acting on his behalf shall explain to buyer and seller, or lessor and lessee, that there will be a conflict as to a limited agent's duties of confidentiality and full disclosure, and shall explain what kinds of information will be held confidential if told to a limited agent by either buyer or seller, or lessor and lessee, and what kinds of information will be disclosed if told to the limited agent by either party. The limited agent may not disclose any information given to the agent by either principal which would likely weaken that party's bargaining position if it were known, unless the agent has permission from the principal to disclose the information; and

(c) The principal broker or a licensee acting on his behalf shall explain to the buyer and seller, or lessor and lessee, that the limited agent will be required to disclose information given to the agent in confidence by one of the parties if failure to disclose the information would be a material misrepresentation regarding the property or regarding the abilities of the parties to fulfill their obligations.

(d) The Division and the Commission shall consider use of consent language approved by the Division and the Commission to be informed consent.

6.2.16.3.2. In addition, a limited agent owes the following fiduciary duties to all parties:

(a) Obedience, which obligates the limited agent to obey all lawful instructions from either the buyer or the seller, lessor and lessee, consistent with the agent's duty of neutrality;

(b) Reasonable care and diligence;

(c) Holding safe all money or property entrusted to the limited agent; and

(d) Any additional duties created by the agency agreement.

6.2.16.4. Duties of a sub-agent. A principal broker and licensees acting on his behalf who act as sub-agents owe the same fiduciary duty to a principal as the brokerage retained by the principal.

© 2001 Matthew Bender & Company, Inc , a member of the Lexis-Nexis® Group All rights reserved

ADDENDUM
D

61-2-1. License required.

(1) It is unlawful for any person to engage in the business, act in the capacity of, advertise, or assume to act as a principal real estate broker, associate real estate broker, or a real estate sales agent within this state without a license obtained under this chapter.

(2) It is unlawful for any person outside the state to engage in the business, act in the capacity of, advertise, or assume to act as a principal real estate broker, associate real estate broker, or a real estate sales agent with respect to real estate located within the state without a license obtained under this chapter.

History: L. 1921, ch. 110, § 1; R.S. 1933, 82-2-1; L. 1939, ch. 106, § 1; C. 1943, 82-2-1; L. 1983, ch. 257, § 1; 1985, ch. 162, § 1; 1996, ch. 102, § 1.

Amendment Notes. - The 1996 amendment, effective April 29, 1996, made a stylistic change and added Subsection (2).

Cross-References. - Statute of frauds, brokers' contracts as within, § 25-5-4.

Timeshare and camp resort project salesperson, § 57-19-14.

© 2001 Matthew Bender & Company, Inc , a member of the Lexis-Nexis® Group All rights reserved

ADDENDUM
E

61-2-6. Licensing procedures and requirements.

(1) The Real Estate Commission shall determine the qualifications and requirements of applicants for a principal broker, associate broker, or sales agent license. The division, with the concurrence of the commission, shall require and pass upon proof necessary to determine the honesty, integrity, truthfulness, reputation, and competency of each applicant for an initial license or for renewal of an existing license. The division, with the concurrence of the commission, shall require an applicant for a sales agent license to complete an approved educational program not to exceed 90 hours, and an applicant for an associate broker or principal broker license to complete an approved educational program not to exceed 120 hours. The hours required by this section mean 50 minutes of instruction in each 60 minutes; and the maximum number of program hours available to an individual is ten hours per day. The division, with the concurrence of the commission, shall require the applicant to pass an examination approved by the commission covering the fundamentals of the English language, arithmetic, bookkeeping, real estate principles and practices, the provisions of this chapter, the rules established by the Real Estate Commission, and any other aspect of Utah real estate license law considered appropriate. Three years' full-time experience as a real estate sales agent or its equivalent is required before any applicant may apply for, and secure a principal broker or associate broker license in this state. The commission shall establish by rule the criteria by which it will accept experience or special education in similar fields of business in lieu of the three years' experience.

(2) (a) The division, with the concurrence of the commission, may require an applicant to furnish a sworn statement setting forth evidence satisfactory to the division of the applicant's reputation and competency as set forth by rule.

(b) The division shall require an applicant to provide his social security number, which is a private record under Subsection 63-2-302(1)(g).

(3) A nonresident principal broker may be licensed in this state by conforming to all the provisions of this chapter except that of residency. A nonresident associate broker or sales agent may become licensed in this state by conforming to all the provisions of this chapter except that of residency and by being employed or engaged as an independent contractor by or on behalf of a nonresident or resident principal broker who is licensed in this state.

(4) An applicant who has had a real estate license revoked shall be relicensed as prescribed for an original application, but may not apply for a new license until at least five years after the revocation. In the case of an applicant for a new license as a principal broker or associate broker, the applicant is not entitled to credit for experience gained prior to the revocation of license.

History: L. 1921, ch. 110, § 6; 1925, ch. 79, § 1; 1929, ch. 77, § 1; R.S. 1933 & C. 1943, 82-2-6; 1951, ch. 102, § 1; 1951, ch. 103, § 1; 1963, ch. 146, § 1; 1975, ch. 172, § 13; 1979, ch. 194, § 2; 1983, ch. 257, § 7; 1985, ch. 162, § 7; 1988, ch. 182, § 2; 1993, ch. 146, § 2; 1997, ch. 232, § 26.

Amendment Notes. - The 1997 amendment, effective July 1, 1997 added Subsection (2)(b) and made a related redesignation.

NOTES TO DECISIONS

© 2001 Matthew Bender & Company, Inc , a member of the Lexis-Nexis® Group All rights reserved

ADDENDUM
F

78-12-23. Within six years - Mesne profits of real property - Instrument in writing.

An action may be brought within six years:
(1) for the mesne profits of real property;
(2) upon any contract, obligation, or liability founded upon an instrument in writing, except those mentioned in Section 78-12-22.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-23; L. 1984, ch. 16, § 2; 1996, ch. 79, § 109; 1996, ch. 210, § 5.

Amendment Notes. - The 1996 amendment by ch. 79, effective April 29, 1996, in the introductory paragraph, substituted "An action may be brought within" for "Within"; deleted "An action" at the beginning of Subsections (1) to (3); and in Subsections (1) and (2), substituted a semicolon for a period.

The 1996 amendment by ch. 210, effective April 29, 1996, deleted former Subsection (3) regarding distribution of criminal proceeds to victims.

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

Cross-References. - Product Liability Act, statute of limitations, § 78-15-3.

Promise to pay extends period, § 78-12-44.

Three-year limitation period for action on written insurance contract, § 31A-21-313.

© 2001 Matthew Bender & Company, Inc , a member of the Lexis-Nexis® Group All rights reserved

ADDENDUM
G

Rule 56. Summary judgment.

(a) *For claimant.* A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For defending party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and proceedings thereon.* The motion, memoranda and affidavits shall be filed and served in accordance with CJA 4-501. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) *Case not fully adjudicated on motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of affidavits; further testimony; defense required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) *When affidavits are unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits made in bad faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the

© 2000 Matthew Bender & Company, Inc., one of the LEXIS Publishing™ companies. All rights reserved.

ADDENDUM
H

§ 897. Merger in Judgment

A cause of action for a tort may be terminated by its merger in a valid judgment for the plaintiff.

Comment:

a. It is not within the scope of this Restatement to treat the details of the principle of res judicata, including the application of the rule of merger. For statement of this rule, see Restatement, Second, Judgments § 47 (Tent. Draft).

§ 898. Bar by Judgment

A cause of action for a tort may be terminated because it is barred by a previous valid judgment for the defendant.

Comment:

a. It is not within the scope of this Restatement to treat the details of the principle of res judicata, including the application of the rule of bar. For statement of the rule, see Restatement, Second, Judgments § 48 (Tent. Draft).

§ 899. Statutes of Limitations

A cause of action for a tort may be barred through lapse of time because of the provisions of a statute of limitations.

Comment:

a. The statutes commonly known as statutes of limitations are ordinarily applicable to actions at law and to equitable proceedings in which there is a concurrent legal remedy. As frequently interpreted, they do not apply to equitable proceedings based upon purely equitable rights. In many states, however, statutes are specifically applicable to equitable proceedings and in other states equitable proceedings may be barred by analogy to the statutes of limitations. For specific statements with reference to statutes limiting the time in which actions for the recovery of land and for harm to land may be brought, see Restatement of Property, §§ 220–227.

b. An act and its consequences may be both a tort and a breach of contract and may also give rise to a restitutionary right. When this is so, the injured person, although barred by

a statute from maintaining an action of tort may not be barred from enforcing his contractual or restitutionary right or vice versa, since the statutes commonly provide for a different period of limitation for tort actions and for those based upon a breach of contract or the right of restitution. A statute of limitations frequently provides for a longer period for one type of wrong, such as a conversion, than for another type, such as an injury to reputation.

A person injured by a tort that would be indivisible if he were to bring action at once may be able to maintain an action for the damage not barred by the statute, although his remedy for the other harm has been barred. Thus when a car and its owners are injured in a collision, the cause of action for harm to the person may terminate before that for harm to the chattel. When there are joint tortfeasors, the cause of action may be barred against one tortfeasor and not against another, either because there is a statute applicable to only one of the tortfeasors or because one of them leaves the jurisdiction. On nuisance, see Comment *d*.

c. Time when statute begins to run. Statutes of limitations ordinarily provide that an action may be commenced only within a specified period after the cause of action arises. Although the courts have not been consistent in applying this limitation strictly, the interpretation of the statute as applied to torts has been such that the statute does not usually begin to run until the tort is complete, and may not begin to run even then if there has been a series of continuous acts.

A tort is ordinarily not complete until there has been an invasion of a legally protected interest of the plaintiff. Thus when one makes a fraudulent misrepresentation to another, the tort is not complete until the other acts upon it to his detriment.

A battery is complete upon physical contact, even though there is no observable damage at the point of contact. An assault is complete when anticipation of harm occurs. A cause of action for negligently harming a person or a thing is complete when the harm occurs. A cause of action for mental shock or mental distress is complete when the shock or distress occurs, if the shock or distress itself is sufficient for the tort (see § 46); but if some resulting bodily harm is necessary to the cause of action, it is not complete until the bodily harm occurs. For false imprisonment, the statute begins to run only when the imprisonment ends, since the period of imprisonment is treated as a unit.